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October 15, 1970

DEPARTMENT OF LAW OPINION NO. 70-25 (R-101)

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REQUESTED BY: THE HONORABLE ROSE SILVER  
Pima County Attorney

QUESTIONS:

1. Under A.R.S. § 36-1706.A.2, is jurisdiction and control over "agencies and departments of the state and its political subdivisions" vested exclusively in the state division of air pollution control?
2. What does "jurisdiction and control" consist of?
3. Under A.R.S. § 36-1706.A.2, does "agencies and departments of the state and its political subdivisions" include the University of Arizona or School District Number One?
4. If the Pima County Board of Supervisors adopts rules and regulations in compliance with A.R.S. § 36-779, and such rules and regulations are violated by the University of Arizona, School District Number One, Pima County, etc., can a complaint be filed against them by the control officer, as provided in A.R.S. § 36-781?
5. If a violation, as discussed in the above question, occurs on an Indian reservation in Pima County, does the state or county have jurisdiction and control? Would the answer be the same whether the violation were committed by an Indian or a non-Indian? Which court (Superior Court, Justice Court, United States District Court) has jurisdiction to hear complaints alleging air pollution violations occurring on Indian Reservations?

6. A.R.S. § 36-789.01 makes an air pollution violation a misdemeanor and imposes a fine of not less than \$50.00 nor more than \$1,000.00. Does that provision remove from the Justice Court jurisdiction to hear air pollution complaints?
7. Can the Pima County Board of Supervisors, in adopting rules and regulations under A.R.S. § 36-779, limit the maximum penalty to \$300.00 in order that the Justice Court retain jurisdiction over air pollution matters?
8. A.R.S. § 36-789.G provides that unlawful open burning shall be punished under A.R.S. § 36-789.01. If the maximum penalty of \$1,000.00 removes jurisdiction from the Justice Court, would the authority of officers as set forth in A.R.S. § 13-1422 and as provided for in A.R.S. § 36-789.G remain a valid procedure when a person is arrested for violation of A.R.S. § 36-789?

ANSWERS:

1. Yes. See body of opinion.
2. See body of opinion.
3. Yes.
4. See body of opinion.
5. See body of opinion.
6. Yes.
7. No.
8. No.

1. A.R.S. § 36-1706.A provides that the division and the state hearing board shall have "original jurisdiction" and control over air pollution matters that pertain to "agencies and departments of the state and its political subdivisions". Subsection B of the same statute enumerates the conditions under which the state authorities shall be the "sole and exclusive jurisdiction and control".

A.R.S. §§ 36-770 and 36-1700 state the Legislature's intention of placing primary responsibility for air pollution control and abatement in the State Department of Health and the hearing board created thereunder. However, A.R.S. § 36-1705.B empowers the state division of air pollution control to delegate authority to a county or multi-county air control region to carry out the provisions of the state air pollution control chapter.

Therefore, original jurisdiction, and to that degree exclusive jurisdiction, over agencies and departments of the state and its political subdivisions is within the state division of air pollution control and state hearing board, unless such jurisdiction has been delegated to a county or multi-county control region pursuant to A.R.S. § 36-1705.B.

2. Jurisdiction and control is generally the authority, capacity, power or right to act, regulate or exercise a governing influence. In relation to A.R.S. § 36-1706, jurisdiction and control consists of the procedures outlined in Chapter 14, Title 36, as within the functions of the division and state hearing board, including but not limited to installation permits, operating permits, conditional permits and procedures surrounding violations.

3. An agency of the state will generally include the government of the state and any subdivision, agency, and instrumentality, corporate or otherwise, of the state government. A tax supported public state university under the jurisdiction and control of the Arizona Board of Regents would, in its operations and activities, fall within the jurisdiction of the division and state hearing board over all agencies and departments of the state. Board of Regents of the Universities, etc. v. City of Tempe, 88 Ariz. 299,

356 P.2d 399 (1960), classified the Board of Regents as a public agency of the state rather than a private corporation. In State v. Miser, 50 Ariz. 244, 72 P. 408 (1937), the Board of Regents were looked upon as a state agency for the purpose of the minimum wage law.

School District Number One would also be included within "agencies and departments of the state and its political subdivisions". While a school district is not an "improvement district" within Article 13, § 7 of the Arizona Constitution, it has been characterized as a "political subdivision" of Arizona, as are counties, cities, towns, and improvement districts. Hernandez v. Frohmiller, 68 Ariz. 242, 204 P.2d 854 (1949).

While original jurisdiction over the above does reside in the state, it should again be noted that jurisdiction can be delegated to a county or multi-county control region pursuant to A.R.S. § 36-1705.B.

4. The control officer could proceed against any or all of the above-named entities only if the county or multi-county control regions had been delegated jurisdiction pursuant to A.R.S. § 36-1705.B. See Answer 1 above.

5. A.R.S. § 36-1801 provides in part:

" . . . [J]urisdiction is hereby expressly assumed by the state of Arizona with respect to enforcement of laws relating to air pollution control and the state of Arizona and its political subdivisions shall have jurisdiction with respect to criminal offenses and civil causes of action arising from the enforcement of laws relating to air pollution control on all Indian tribal lands, reservations and allotments. . . ."

The jurisdiction on Indian reservations would thus depend on the source of pollution as set out in A.R.S. § 36-1706.

It would be immaterial whether the violation was by an Indian or non-Indian. The basis of the Act of August 15, 1953, 67-590, giving consent of the United States to any state, not having jurisdiction with respect to criminal or civil actions on Indian lands, to assume such jurisdiction, was 18 U.S.C.A., § 1162, and 28 U.S.C.A., § 1360. The above sections grant criminal jurisdiction for offenses committed either by or against an Indian and civil jurisdiction between Indians or to which an Indian is a party. A.R.S. § 36-1801 further provides that ". . . the provisions of law relating to air pollution control should apply to all persons and all lands located within the state. . . ."

The court having jurisdiction over the offense committed on an Indian reservation would be the same court having jurisdiction had the offense not occurred on an Indian reservation. See Answer to Question 6 below.

6. A.R.S. § 22-301, in setting out the jurisdiction of the Justice Court in criminal misdemeanor matters, provides:

"4. Misdemeanors and criminal offenses punishable by a fine not exceeding three hundred dollars, or imprisonment in the county jail not to exceed six months, or by both such fine and imprisonment."

The test of the jurisdiction of the Justice Court is whether the maximum penalty that may be imposed upon conviction is greater than the court is authorized to inflict. If the penalty may be greater than the maximum that can be imposed, the court is without jurisdiction. W. W. Brookner Co. v. State, 14 Ariz. 546, 132 P. 1136 (1913).

Therefore, original jurisdiction of misdemeanor prosecution under A.R.S. § 36-789.01 is in the Superior Court, as the maximum penalty is beyond the jurisdiction of the Justice Court. Frazier v. Terrill, 65 Ariz. 131, 175 P.2d 438 (1946).

7. The County Board of Supervisors has only such power as has been expressly or by necessary implication delegated to them by the Legislature. Associated Dairy Products Co. v.

Page, 68 Ariz. 393, 206 P.2d 1041 (1949). The Board of Supervisors may not, by rule and regulation pursuant to A.R.S. § 36-779, limit the penalty provided for in A.R.S. § 36-789.01 in order to retain the jurisdiction over air pollution matters in the Justice Court.

A regulation of this nature would be beyond the scope contemplated by A.R.S. § 36-779, and would not qualify as containing standards "at least equal to or more restrictive than those adopted by the state board of health."

Once the Legislature has specified the limits of the penalty, action limiting that penalty would be beyond the authority conferred on the Board of Supervisors in either A.R.S. § 36-779 or A.R.S. § 11-251.30. Such a rule would conflict with the general law.

8. The procedure outlined in A.R.S. § 13-1422, including provisions for direct complaint, notice and promise to appear for a misdemeanor, does not appear to be an appropriate procedure for prosecution under A.R.S. § 36-789.01.

The penalty imposed by A.R.S. § 36-789.01, as noted above, is beyond the jurisdiction of the Justice Court, and, therefore, the Superior Court has original jurisdiction.

When a misdemeanor is prosecuted in the Superior Court, it must necessarily be prosecuted by information or indictment, and a prosecution cannot be maintained in the Superior Court without an information on the theory that the Judge of the Superior Court is acting as the Magistrate. Sheridan v. Superior Court, 91 Ariz. 211, 370 P.2d 949 (1962), Rule 78, Arizona Rules of Criminal Procedure.

Except in the case of a preliminary hearing, which is not required in prosecution under A.R.S. § 36-789.01, an information must be subscribed by the County Attorney. Rule 111, Arizona Rules of Criminal Procedure.

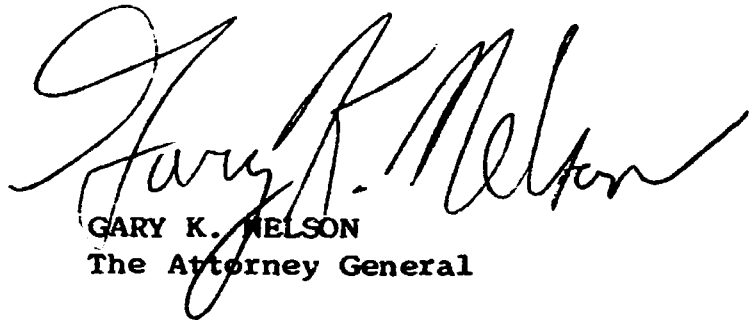
Therefore, the procedure outlined in A.R.S. § 13-1422, involving the use of a direct complaint signed by an arresting officer, which could pursuant to A.R.S. § 36-789.01

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include a control officer and his deputies, appears inconsistent with the requirement of an information required in the Superior Court by Article 2, Section 3 of the Arizona Constitution.

In attempting to abate pollution by increasing penalties, the Legislature has divested the Justice Court of jurisdiction. Reinstatement of that jurisdiction in the Justice Courts in minor infractions, with accompanying simplified direct complaints, are areas in which only the Legislature may grant relief.

Respectfully submitted,



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The Attorney General

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